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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Mono)

DAVID S. BAUMWOHL, Plaintiff and Appellant, v. JP MORGAN CHASE BANK, NATIONAL ASSOCIATION et al., Defendants and Respondents.	C079164 (Super. Ct. No. CV110085)

Plaintiff David S. Baumwohl sued JP Morgan Chase Bank, N.A. (Chase) and California Reconveyance Company (California Reconveyance) (collectively defendants) to stop the foreclosure of his home.

The merit of plaintiff's suit rested on his claim defendants lacked authority to initiate foreclosure proceedings and to negotiate a loan modification. Defendants moved for summary judgment. Finding plaintiff lacked standing to challenge the assignment he

argued was void and resulted in defendants' lack of authority, the court granted defendants' motion and entered judgment in their favor.

Plaintiff appeals contending he has standing, especially now that defendants have sold his home, and a material issue of fact exists regarding whether defendants had the authority to initiate foreclosure proceedings against him. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I

The Loan

In April 2007, plaintiff executed a deed of trust securing a note on a condominium. The lender and beneficiary of the trust deed was Washington Mutual. Paragraph 20 of the trust deed provides that the note, together with the trust deed, can be sold one or more times without prior notice to the borrower. Paragraph 22 sets forth the remedies available to the lender in the event of a default. Those remedies include: (1) the lender's right to accelerate the debt after notice to the borrower; and (2) the lender's right to "invoke the power of sale" after the borrower has been given written notice of default and of the lender's election to cause the property to be sold. Thus, under the trust deed, it is the lender-beneficiary that decides whether to pursue nonjudicial foreclosure in the event of an uncured default by the borrower. The trustee implements the lender-beneficiary's decision by conducting the nonjudicial foreclosure.

Shortly after executing the deed of trust, Washington Mutual entered into a pooling and servicing agreement (the pooling agreement) bundling plaintiff's mortgage with other mortgages into the "WaMu Mortgage Pass-Through Certificates Series 2007-HY6 Trust" (the trust), organized under chapter 38 of title 12 of the Delaware Code.[1] Under the agreement, WaMu Asset Acceptance Corp. acted as depositor and was the

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[1] Plaintiff objected to the admission of the pooling agreement and argues on appeal it should have been excluded from evidence.

"owner" of the mortgages being pooled and would transfer its interest in the mortgage to the trust, with LaSalle Bank National Association (LaSalle Bank) acting as trustee. Washington Mutual remained the servicer of plaintiff's loan. As servicer, Washington Mutual became an agent of the trust to administer the loans in accordance with the terms of the loans and "ha[d] full power and authority to do or cause to be done any and all things in connection with such servicing and administration . . . , including, without limitation, the power and authority to bring action and defend the Mortgage Pool Assets on behalf of the Trust in order to enforce the terms of the Mortgage Notes." Washington Mutual also had the authority to "waive, modify or vary any term of any Mortgage Loan or consent to the postponement of strict compliance with any such term or in any manner grant indulgence to any Mortgagor . . . ." Through a later merger and then an acquisition, the trustee of the trust became U.S. Bank.

Washington Mutual was acquired by Chase in 2008 and Chase became the servicer of plaintiff's loan.[2] In January 2011, plaintiff stopped paying his monthly mortgage. In May 2011, California Reconveyance recorded a notice of default and election to sell. On that same day, it also recorded an assignment of deed of trust assigning Chase's, as successor in interest to Washington Mutual, beneficial interest in plaintiff's mortgage to the trust. California Reconveyance recorded a notice of trustee sale on August 22, 2011.

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[2] Plaintiff objected to admission of the purchase and assumption agreement (the purchase agreement) between the Federal Deposit Insurance Corporation (FDIC), receiver of Washington Mutual upon its collapse, and Chase, wherein Chase purchased certain assets of Washington Mutual. He argues on appeal it should have been excluded from evidence.

II

The Litigation

The operative complaint sought relief on five causes of action: (1) quiet title, (2) injunctive relief, (3) declaratory relief, (4) fraud, and (5) unfair business practice pursuant to Business and Professions Code section 17200. It alleged defendants had no claim of "right, title, or interest as to the Mortgage and ha[d] no standing as the beneficiary under the Deed of Trust to pursue the pending foreclosure." This conclusion rested on the theory that the assignment of the beneficial interest in plaintiff's mortgage was void. He argued the 2007 assignment to the trust was void because it was not documented as required by the pooling agreement and by New York law, which governed the trust. This left WaMu Asset Acceptance Corp. as the beneficiary, which the pooling agreement indicated was the owner of plaintiff's mortgage and would transfer its interest in the mortgage to the trust. As to the assignment of the trust deed recorded in May 2011, plaintiff alleged Chase "had no right, title, or interest in and to the Note, Deed of Trust, or Mortgage to assign, and no standing to pursue and prosecute the pending non-judicial foreclosure" because the beneficial interest had already been transferred in 2007 to WaMu Asset Acceptance Corp. before it was to be transferred to the trust.

The complaint further alleged "Defendants falsely and fraudulently subjected Plaintiff to the [modification application] process when Defendants had no right, title or interest in and to the Mortgage and had no power to legally or otherwise consider any loan modification. At the same time, Defendants falsely and fraudulently concealed from Plaintiff the fact Defendants had no claim of right, title or interest in and to the Note, the Deed of Trust, or the Mortgage."

Defendants moved for summary judgment arguing plaintiff could not prevail on his quiet title, injunctive relief, and declaratory relief causes of action because Chase, as agent to the beneficiary, and California Reconveyance, as trustee, acted within authority when initiating foreclosure proceedings. Defendants argued plaintiff could not prove

otherwise because he lacked standing to challenge the assignment of the beneficial interest in the mortgage. As to plaintiff's fraud cause of action, defendants argued Chase never made any misrepresentation to him and, even if Chase did, plaintiff was not damaged as a result of the misrepresentations. Finally, defendants argued plaintiff's unfair business practice cause of action failed because plaintiff could not establish a predicate wrongful act.

Attached to defendants' motion for summary judgment was a declaration from Margaret Dyer. Dyer declared she worked for Chase and had access to its regularly kept business records as part of her duties. She had "personal knowledge of the facts in this declaration based upon the records available" to her. The documents she reviewed and attached to her declaration, including the purchase agreement and the pooling agreement, were "maintained in the course of Chase's regularly- and ordinarily-conducted business, and contain entries of activities recorded at or near the time of the events reflected therein." Dyer had knowledge of Chase's acquisition of "certain assets and liabilities" from the FDIC, acting as receiver for Washington Mutual. It is Chase's regular business practice to keep records of loans received through acquisitions. Dyer also had knowledge of business records formerly kept by Washington Mutual, which Chase obtained after its acquisition. Chase kept these records in the course of its regular business activities and relied on the accuracy of such records when administering and servicing the assets acquired from Washington Mutual.

As to the substance of the records relevant to plaintiff's appellate claims, Dyer declared that shortly after plaintiff took out his home mortgage, Washington Mutual and LaSalle Bank entered into the pooling agreement, in which the trust was established. Plaintiff's mortgage was identified in the pooling agreement as one of the mortgages to be transferred and on May 23, 2007, the mortgage was transferred. Also on that date, Washington Mutual assigned its beneficial interest in the mortgage to LaSalle Bank as

trustee of the trust. Despite transfer of the beneficial interest, Washington Mutual remained servicer of plaintiff's loan.

On September 25, 2008, the FDIC was appointed receiver for Washington Mutual. That same day, Chase and the FDIC entered into the purchase agreement whereby Chase purchased all of Washington Mutual's loans and mortgage servicing rights. As the servicer of plaintiff's loan, Chase now had the authority to collect monthly payments, review plaintiff for loan modification, and offer loan modification based on its review.

Plaintiff objected to the admission of Dyer's declaration and to the pooling and purchase agreements. The court found Dyer to be a qualified witness based on her job duties and training. It did, however, sustain several of plaintiff's objections to Dyer's individual statements that represented legal conclusions and to her statements regarding records kept by Washington Mutual because Dyer did not declare to possess knowledge of Washington Mutual's record keeping practices. It admitted the pooling agreement into evidence finding it a business record of Chase's and because it was a legally operative contractual document. It took judicial notice of the purchase agreement.

The court also granted defendants' motion for summary judgment. It found plaintiff did not have standing to challenge the assignment in the pooling agreement because, even if there was a defect, the assignment would not be void but merely voidable. In other words, it found plaintiff could not rebut defendants' showing that defendants had the authority to initiate foreclosure proceedings or show there was an issue of material fact in that regard. Given the trial court's preliminary findings, it concluded summary adjudication in favor of defendants was appropriate for the injunctive and declaratory relief causes of action. It also concluded plaintiff's quiet title cause of action failed for this same reason and because plaintiff did not tender his indebtedness. Finally, it summarily adjudicated plaintiff's fraud and unfair business practice causes of action in defendants' favor concluding plaintiff failed to show a misrepresentation or wrongful business practice that caused him damages.

Plaintiff appeals. Following the filing of this appeal, plaintiff's home was sold at a foreclosure sale.[3]

DISCUSSION[4]

"[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that [it] is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; accord, Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment must make a prima facie showing either that the plaintiff cannot establish one or more elements of a cause of action or that there is a complete defense to the action. (*Aguilar*, at p. 850; Code Civ. Proc., § 437c, subds. (o), (p)(2).) A defendant moving for summary judgment may satisfy this initial burden of production by presenting evidence that conclusively negates an element of the plaintiff's cause of action or by relying on the plaintiff's factually devoid discovery responses to show that plaintiff does not possess, and cannot reasonably obtain, evidence to establish that element. (*Aguilar*, at pp. 854-855.) The opposing party has no obligation to show a triable issue of material fact exists unless and until the moving party has met its burden. (*Villa v. McFerren* (1995) 35 Cal.App.4th 733, 743-744.) If the defendant makes such a showing, the burden shifts to the plaintiff to present evidence showing there is a triable issue of material fact. (*Aguilar*, at p. 850.)

On review of an order granting summary judgment, an appellate court "independently examine[s] the record in order to determine whether triable issues of fact exist to reinstate the action." (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) "We will affirm an order granting summary judgment . . . if it is correct on any ground that the parties had an adequate opportunity to address in the trial

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3 Plaintiff's motion for judicial notice of the trustee's deed upon sale is granted. The motion is otherwise denied.

4 The panel as presently constituted was assigned in February 2019.

court . . . ." (*Securitas Security Services USA, Inc. v. Superior Court* (2011) 197 Cal.App.4th 115, 120.)

I

The Court Properly Admitted Dyer's Declaration As Well As The Pooling And Purchase Agreements

As part of his opposition to defendants' summary judgment motion, plaintiff objected to the admission of Dyer's declaration and the attached documents. He argued Dyer could not qualify as a custodian of records for many of the records attached to her declaration, making the documents hearsay and inadmissible. He raises the same arguments on appeal but to only Dyer's declaration and the pooling and purchase agreements. We disagree.

Addressing plaintiff's challenge to Dyer's declaration first, we conclude the court did not err. Plaintiff argues Dyer could not testify as a custodian of record because she never declared she had personal knowledge of Chase's record keeping practices at the time of the 2007 pooling agreement or the 2008 purchase agreement, nor did she have knowledge of Washington Mutual's or the FDIC's record keeping practices. Plaintiff argues this information was required before the court could admit the agreements as business records and consider the truth of the statements contained therein, especially as to those facts occurring before Chase had possession of the records.

The problem with plaintiff's argument is that it is irrelevant given that the court also admitted the agreements on grounds other than the business records exception to the hearsay rule. Dyer's declaration was not a necessary prerequisite to the admission of the agreements and we need not determine her custodial status for the purpose of admitting those two agreements. To the extent plaintiff attacks Dyer's statements regarding the meaning of those agreements, we note the trial court sustained many of plaintiff's specific objections to Dyer's declaration. It sustained objections to statements regarding Washington Mutual's record keeping practices and trustworthiness. The same is true as

to plaintiff's objection to Dyer's conclusion that the pooling agreement assigned LaSalle Bank the beneficial interest in plaintiff's mortgage. In fact, the court sustained plaintiff's objections as to all the legal conclusions made in Dyer's declaration. Instead, it let the agreements speak for themselves.

There too, plaintiff contends the trial court erred. Specifically, he argues the court should not have taken judicial notice of the agreements, and even if it could, it was prohibited from taking notice of the legal effect. The admissibility of the purchase agreement was addressed in *Scott*, which held it admissible. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 752-753.)

"First, [Evidence Code] section 452, subdivision (c) provides that judicial notice may be taken of '[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.' This subdivision 'enables courts in California to take notice of a wide variety of official acts . . . [and] [a]n expansive reading must be provided to certain of its phrases[;] included in "executive" acts are those performed by administrative agencies.' [Citation.] Scott does not dispute that official acts of the FDIC may be subject to judicial notice under [Evidence Code] section 452, subdivision (c). As JPMorgan argues, the FDIC's official acts of seizing Wa[shington]Mu[tual]'s assets and publishing the [purchase] Agreement are judicially noticeable." (*Scott v. JPMorgan Chase Bank, N.A., supra,* 214 Cal.App.4th at pp. 752-753.)

"Second, [Evidence Code] section 452, subdivision (h) provides that judicial notice may be taken of '[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.' In this case, the fact of the [purchase] Agreement and the fact of the transfer to JPMorgan of Wa[shington]Mu[tual] assets, but not liabilities for borrower's claims, are not reasonably subject to dispute and are capable of ready determination, particularly since [plaintiff] did not question with specificity the

authenticity, completeness, or legal effect of the [purchase] Agreement posted on the official FDIC Web site. Numerous federal courts have taken judicial notice of the [purchase] Agreement on a similar basis." (*Scott v. JPMorgan Chase Bank, N.A.*, *supra*, 214 Cal.App.4th at p. 753.)

The *Scott* court further held, and we agree, the trial court can take notice of the truth of the facts within the purchase agreement. "Where, as here, judicial notice is requested of a *legally operative* document -- like a contract -- the court may take notice not only of the fact of the document and its recording or publication, but also facts that clearly derive from its *legal effect*. [Citation.] Moreover, whether the fact derives from the legal effect of a document or from a statement within the document, the fact may be judicially noticed where, as here, the fact is not reasonably subject to dispute." (*Scott v. JPMorgan Chase Bank, N.A.*, *supra*, 214 Cal.App.4th at p. 754.)

"Strictly speaking, a court takes judicial notice of facts, not documents. (Evid. Code, § 452, subds. (g), (h).) When a court is asked to take judicial notice of a document, the propriety of the court's action depends upon the nature of the facts of which the court takes notice from the document. . . . [A] court may take judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in a recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity. From this, the court may deduce and rely upon the legal effect of the recorded document, when that effect is clear from its face." (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 265.)

Here, the court did not err by admitting the purchase and pooling agreements and the legal effect of those documents. Specific to the purchase agreement, plaintiff does not dispute its authenticity. Indeed, he contends only that the rules on judicial notice forbid noticing the legal effect of documents. As discussed, this is not true. Specific to the pooling agreement, plaintiff questions its authenticity based on Chase's takeover of

Washington Mutual that necessitated the chaotic transfer of records. Plaintiff, however, does not point to the pooling agreement itself when arguing its inauthenticity. Indeed, the pooling agreement attached to Dyer's declaration appears to be the complete agreement with an appendix listing the mortgages in the pool. The pooling agreement does not appear to be incomplete, altered, or missing provisions. Other than speculation of a chaotic transfer of records, there is no serious doubt as to the authenticity of the pooling agreement. (Cf. *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 886-891 [court reached the opposite conclusion because, in that case, serious doubt existed as to the completeness of the purchase agreement downloaded from the FDIC Web site].)

Accordingly, the court did not err by admitting portions of Dyer's declaration and the pooling and purchase agreements.

II

The Court Properly Granted Defendants' Motion For Summary Judgment

Plaintiff concedes "all of [his] causes of action rested on his central allegation that the purported transfer of his loan into the securitized trust was void." On this point, defendants presented evidence they were authorized parties to initiate foreclosure proceedings against plaintiff. Plaintiff took out a mortgage from Washington Mutual, with Washington Mutual being named as the beneficiary to the trust deed and California Reconveyance being named the trustee. Washington Mutual later pooled plaintiff's mortgage with other home mortgages and the beneficial interest in those mortgages was assigned to the trust, while Washington Mutual remained servicer of the loan and an agent of the beneficiary. The rights retained under that pooling agreement were later bought by Chase as part of the purchase agreement when it acquired much of Washington Mutual's assets following Washington Mutual's collapse. Because defendants satisfied the burden as the party moving for summary judgment, the burden shifted to plaintiff to present evidence showing there was a triable issue of material fact. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850.)

Plaintiff contends there is a triable issue of material fact as to the propriety of the assignment contained in the pooling agreement. He argues we may consider this contention under our Supreme Court's *Yvanova* decision, especially now that his home has been sold at a foreclosure sale. We disagree.

In *Yvanova*, our Supreme Court held a borrower has standing to assert a wrongful foreclosure action after a trustee's sale has taken place, based on allegations an assignment was void, and not merely voidable at the request of the parties to the assignment. (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 923.) The *Yvanova* court concluded: "If a purported assignment necessary to the chain by which the foreclosing entity claims that power is absolutely void, meaning of no legal force or effect whatsoever [citations], the foreclosing entity has acted without legal authority," and the borrower would have standing to sue for wrongful foreclosure after such an unauthorized sale. (*Yvanova*, at p. 935.) The court reasoned that a contrary ruling would completely deprive California borrowers whose loans are secured by a deed of trust of any means to assert their legal protections. (*Ibid*.) The court also explained: "A homeowner who has been foreclosed on by one with no right to do so has suffered an injurious invasion of his or her legal rights at the foreclosing entity's hands. No more is required for standing to sue." (*Id*. at p. 939.) The court disapproved a line of Court of Appeal decisions to the extent "they held borrowers lack standing to challenge an assignment of the deed of trust as void." (*Id*. at p. 939, fn. 13; see *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497; *Siliga v. Mortgage Electronic Registration Systems, Inc*. (2013) 219 Cal.App.4th 75; *Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495; *Fontenot v. Wells Fargo Bank, N.A.*, *supra*, 198 Cal.App.4th 256.)

Even if *Yvanova* applied to plaintiff's case, his argument still lacks merit because he has not shown he is challenging a void assignment, as opposed to a voidable assignment, as required. (*Yvanova v. New Century Mortgage Corp.*, *supra*, 62 Cal.4th at

p. 935.) Although *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079 previously provided support for plaintiff's void theory, subsequent decisions have made clear that the failure to timely record the assignment did not render it void.[5] Noting that the New York trial court order on which *Glaski* based its interpretation of New York law had later been reversed on appeal (see *Wells Fargo Bank, N.A. v. Erobobo* (N.Y.App.Div. 2015) 127 A.D.3d 1176, 1178), and that the Second Circuit Court of Appeals had held that a post-closing transfer is not void under New York law, but only voidable (*Rajamin v. Deutsche Bank Nat'l Trust Co*. (2d Cir. 2014) 757 F.3d 79, 88-90), the Second, Third, and Fourth Appellate Districts have all held that such an untimely assignment is merely voidable. (*Yhudai v. IMPAC Funding Corp*. (2016) 1 Cal.App.5th 1252, 1259 ["Because the decision upon which *Glaski* relied for its understanding of New York law has not only been reversed, but soundly and overwhelmingly rejected, we decline to follow *Glaski* . . . . [A] postclosing assignment of a loan to an investment trust that violates the terms of the trust [is] voidable, not void, under New York law"]; accord, *Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 816 [rejecting "the discredited *Glaski* interpretation of New York law, an interpretation expressly rejected by the appellate courts in New York"]; *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 815 & fn. 5 [similar].)

Plaintiff attempts to avoid this outcome by arguing New York law does not apply to the trust. While we agree the trust was organized under Delaware law, that was not what was alleged in the complaint. Defendants "had the burden on summary judgment of negating only those ' "theories of liability *as alleged in the complaint*" ' and were not

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5 In *Yvanova*, the Supreme Court endorsed *Glaski's* holding that a homeowner has standing to challenge a void assignment of a loan (*Yvanova v. New Century Mortgage Corp., supra*, 62 Cal.4th at p. 929), but the court expressly did not decide whether failure to comply with the closing date of a pooling agreement governed by New York law makes an assignment void or merely voidable (*id*. at p. 931).

obliged to ' " 'refute liability on some theoretical possibility not included in the pleadings' " ' " (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1254.) Moreover, plaintiff has not identified any authority interpreting Delaware trust law to find an assignment after a closing date void rather than voidable. To the extent plaintiff argues California law applies, this too must fail. It is established under California law that a debt secured by a deed of trust can be assigned without recordation of any document. (*Fontenot v. Wells Fargo Bank, N.A., supra,* 198 Cal.App.4th at p. 272.) Recordation is not required for the assignment of a beneficial interest in a deed of trust to be effective. (*Haynes v. EMC Mortgage Corp*. (2012) 205 Cal.App.4th 329, 332-336.) Thus, plaintiff has not shown the assignment was void rather than voidable.

Because plaintiff has not shown a void assignment, his causes of action necessarily fail. We need not consider his remaining arguments that he has standing under the trust deed and the Home Owner's Bill of Rights to bring suit, as all of these theories of standing rely on plaintiff's void assignment theory.

DISPOSITION

The judgment is affirmed. Respondents are awarded costs. (Cal. Rule of Court, rule 8.278(a)(2).)

/s/
Robie, Acting P. J.

We concur:

/s/
Murray, J.

/s/
Hoch, J.